

Virginia State Crime Commission



Federal Immigration Law Violations and Preemption

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Agenda



- Federal immigration law violations
 - Aiding illegal aliens
 - Illegal entrance and departure
 - Immigration document fraud
 - Employment of illegal immigrants
- Preemption
- State and local law enforcement authority to enforce immigration law

Federal Immigration Law Violations

Federal Immigration Law Violations



- There are 4 basic categories of offenses:
 - Aiding illegal immigrants;
 - Illegal entrance and departure;
 - Immigration document fraud; and,
 - Employment.

Aiding Illegal Aliens



- It is a criminal violation of immigration law to assist illegal aliens entering the country by:
 - Transporting an illegal alien into the country;
 - Providing a person with entrance documents that are false;
 - Inducing an alien to illegally enter the country;
 - Aiding an alien inadmissible due to a felony conviction or health reason in entering country; and,
 - Importing an alien for prostitution.

Aiding Illegal Aliens (cont.)



- It is also a criminal violation to assist illegal aliens in remaining in the country by:
 - Transporting an illegal alien within the country; and,
 - Concealing or harboring an illegal alien.
 - Specifically harboring for the purpose of prostitution, commercial gain, or knowing the alien will commit a crime

Illegal Entrance and Departure



- It is criminal violation to:
 - Enter or depart in a way other than proscribed by law;
 - Evade examination by immigration officers;
 - Gain entrance by fraud (including false documents, sham marriage, sham business);
 - Reentering after being removed; and,
 - Staying in the country beyond a removal date.
- It is also an administrative violation for an alien to be present in the country in violation of law.

Immigration Document Fraud



- The following are criminal violations:
 - Making a false statement on a application for entrance or adjustment of status;
 - Forging any document needed for entrance;
 - Using or possessing any forged document; and,
 - Providing a forged document to another.

Employment of Illegal Aliens



- It is illegal to:
 - Hire, recruit or refer for a fee, a known illegal alien;
 - Hire without complying with the Employment Verification System; and,
 - Continue to employ an alien known to be illegal.

Preemption

Preemption



- In general, Article 7 of the U.S. Constitution makes the “Constitution, and the laws of the United States” the “supreme law of the land.” Also known as the Supremacy Clause, it prevents the creation of, or “preempts,” existing state or local law that conflicts with existing federal law.
- There is a general, 3-part test for preemption:
 - Explicit or express preemption;
 - Occupation of the field (“field preemption”); or,
 - Implied conflict.

Preemption (cont.)



- Regulation of immigration has been held by the U.S. Supreme Court as an exclusively federal power in DeCanas v. Bica, 424 U.S. 351 (1976).
 - However, the Supreme Court also held that states may still enact immigration legislation if it passes a 3-part test (also known as the DeCanas Test)

Preemption: DeCanas Test (cont.)



- The Supreme Court's test analyzes the following concepts:
 - Does the state law regulate immigration, specifically,
 - Does the law determine who may enter the country or under what conditions may they remain, or
 - Does the regulation use federal standards?
 - Was it Congress' intent to ouster state power in the area
 - The main factors court's will at look are;
 - Is there is Congressional action in the area and is that action a peripheral concern of the regulation, or
 - Has Congress clearly intended to occupy the field.
 - Does the state law conflict with or prevent an objective of the federal law?

Preemption: Express Preemption



- States are **expressly** preempted from creating laws that penalize employers who hire illegal aliens. Section 1324a(h)(2) specifically states:
 - “The provisions of this section preempt any State or local law imposing civil or criminal sanctions (*other than through licensing and similar laws*) upon those who employ, or recruit or refer for a fee for employment unauthorized aliens.”

State Law Enforcement Authority of Immigration Law

State Law Enforcement Authority of Immigration Law



- Currently, there are three U.S. Code sections that authorize state/local law enforcement to make arrests under federal criminal immigration law:
 - 8 U.S.C. § 1252c, § 1324(c), and § 1357(g).
- § 1252c specifically allows state law enforcement officers to arrest and detain an alien who is:
 - Illegally present in the U.S;
 - Previously convicted of a felony in the U.S. and deported or left the U.S. after the conviction;
 - After obtaining confirmation from ICE; and,
 - Detention may only last as long as required to transfer the alien into Federal custody.
 - This has been adopted in Virginia by Va. Code. Ann. § 19.2-81.6.

State Law Enforcement Authority of Immigration Law (cont.)



- Section § 1324(c) (anti harboring statute) permits state officers to makes arrests under that statute; and,
- § 1357(g), also known as the “287(g)” program, provides the ability for local/state law enforcement agencies to enter into a MOU with DHS/ICE, which essentially deputizes the state and local officers as “immigration officers,” with full arrest powers under immigration law.
 - A recent Opinion of the Virginia Attorney General’s Office concludes that under Virginia law, local sheriff’s and police departments have the authority to enter into a MOU with DHS/ICE.

State Law Enforcement Authority of Immigration Law (cont.)



- There are no decisions in the Fourth Circuit that either adopt or reject the concept of “inherent authority” with regard to state enforcement immigration law.
- In 1983 the Ninth Circuit held, in Gonzalez v. City of Peoria, that “State law enforcement officers have authority to make arrests for federal violations ” and that general principle “extends to state enforcement of the Immigration and Naturalization Act as well.”
 - The court further held that state enforcement of immigration law is “limited to criminal provisions.”
- In U.S. v. Salinas-Calderon (1984) The Tenth Circuit also concluded that “State law enforcement officers have the general authority to investigate and make arrests for violations of federal immigration laws” In that case a trooper pulled over a truck for driving erratically, but arrested the driver and passengers under suspicion of violating immigration laws.

State Law Enforcement Authority of Immigration Law (cont.)



- In U.S. v. Vasquez-Alvarez (1999, Tenth Circuit) a Oklahoma police officer arrested suspected drug dealer because he was an “illegal alien.” The court held that U.S. Code section “§ 1252c does not limit or displace the preexisting authority of state or local police officers to investigate and make arrests of federal law, including immigration law. Instead, § 1252c merely creates an additional vehicle for the enforcement of federal immigration law.”
- In U.S. v. Santanna-Garcia (2001, Tenth Circuit) a Utah police officer stopped a car for a traffic violation. The driver did not have a license, speak English, and admitted that he was not “legal.” The officer arrested the driver under a civil violation of immigration law and the court held that the officer has the requisite probable cause to arrest the driver for violating immigration law. Under this case, it appears that the Tenth Circuit has extended state law enforcement authority from just criminal violations of immigration law to civil violations as well.

State Law Enforcement Authority of Immigration Law (cont.)



- DOJ Office of Legal Counsel memos:
 - 1996 Memo: stated “It is well-settled that state law enforcement officers are permitted to enforce federal statutes where such enforcement activities do not impair federal regulatory interests.” This memo, however, limited the state law enforcement authority to criminal violations.
 - 2002 memo: re-affirms state law enforcement authority for criminal violations, but extended this authority to enforce civil violations.

Questions